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HAIRIE MAHTHINEM

v.

PP

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COURT OF APPEAL, PUTRAJAYA
SULONG MATJERAIE JCA
CLEMENT SKINNER JCA
AZAHAR MOHAMED J
[CRIMINAL APPEAL NO: J-05-45-09]

C

18 MARCH 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Conviction and sentence - Appeal against - Failure to consider appellant's defence - Whether trial judge did not*

D

consider whether appellant's version cast reasonable doubt on prosecution's case - Whether there was a fundamental misdirection by trial judge - Criminal Procedure Code, s. 182A

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Conviction and sentence - Appeal against*

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- Physical and mens rea possession - Whether established - Dangerous Drugs Act 1952, s. 37(da)(vi)

The appellant was convicted of an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 and was sentenced to death by

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hanging. In bringing this appeal, the appellant raised two main grounds (i) that the trial judge did not make any specific finding that the appellant was in possession of the offending drugs and (ii) that the prosecution version of the story and the defence version were diametrically opposed to each other and despite this,

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the trial judge did not consider whether the appellant's version had cast a reasonable doubt on the prosecution's case.

Held (allowing the appeal; quashing conviction and setting aside sentence)

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Per Sulong Matjeraie JCA delivering the judgment of the court:

(1) In the judgment of the trial judge, in arriving at her finding that the appellant had physical possession of the green bag containing the offending drug, she had referred to the evidence of SP2, the police officer who led the raiding party. SP2 submitted that on entering House No. 539, the appellant had

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taken flight running out of the back door of the house chased by SP2 and SP7. The appellant, when confronted by a second group of police officers, had released the green bag, stumbled and was apprehended. The trial judge was entitled to come to her finding that the appellant was in physical and *mens rea* possession of the green plastic bag containing the impugned drugs. Thus, the learned judge found a *prima facie* case had been made out against the appellant on the offence charged and called him to enter his defence. (paras 3 & 7)

(2) The defence version given by the appellant was that he was smoking 'ganja' and on entry of the police to the house he had taken flight and just outside the back door he had stumbled and fell and was immediately apprehended by the police. According to the appellant, the first time he had ever set eyes on the green bag was when he was being interrogated at the police station by SP9, the Investigating Officer (IO) and it was in the latter's room that he saw the green bag and was allegedly forced to admit that the green bag belonged to him. The trial judge was obliged to consider all the evidence adduced before her and to decide whether the prosecution had proved the case beyond reasonable doubt under s. 182A Criminal Procedure Code. A perusal of her judgment showed that the trial judge did not consider the version of the appellant at all. She had not analysed or given reasons why the defence version could not be believed. In not having done so, she had failed to consider the version of the appellant *vis a vis* the prosecution's version. There was a fundamental misdirection by the learned judge in considering the defence case. (paras 9, 11-12, 14 & 16-17)

(3) To arrive at a decision whether the version of the prosecution or the defence was to be believed would involve an evaluation of the credibility of the witnesses and how they withstood cross examination. Not having the benefit of the trial judge's audio visual advantage of hearing and receiving that evidence, it would be wrong to make such evaluation to arrive at a finding of which version of the story was preferable. (para 19)

Bahasa Malaysia *Translation Of Headnote*

Perayu disabit dengan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan telah dihukum gantung sampai mati. Dalam membawa rayuan ini, perayu membangkitkan dua alasan (i) hakim bicara gagal membuat mana-mana dapatan spesifik bahawa

perayu mempunyai milikan ke atas dadah-dadah berbahaya dan (ii) bahawa versi cerita pihak pendakwaan dan versi pembelaan adalah menentang sama sekali kepada satu sama lain dan meskipun itu, hakim bicara tidak mempertimbangkan sama ada versi perayu telah membangkitkan keraguan munasabah terhadap kes pendakwaan.

Diputuskan (membenarkan rayuan; membatalkan sabitan dan mengenepikan hukuman)
Oleh Sulong Matjeraie HMR menyampaikan penghakiman mahkamah:

(1) Di dalam penghakiman hakim bicara, dalam mencapai dapatan bahawa perayu mempunyai milikan fizikal ke atas beg hijau yang mengandungi dadah-dadah itu, beliau telah merujuk kepada keterangan SP2, pegawai polis yang menerajui pasukan penyerbu. SP2 berhujah bahawa apabila memasuki rumah nombor 539, perayu telah melarikan diri melalui pintu belakang sambil dikejar oleh SP2 dan SP7. Perayu, apabila berdepan dengan kumpulan pegawai-pegawai polis yang kedua, telah melepaskan beg hijau, tersandung dan terus ditangkap. Hakim bicara berhak membuat dapatan bahawa perayu mempunyai milikan fizikal dan *mens rea* ke atas beg plastik hijau yang mengandungi dadah-dadah tersebut. Oleh itu, hakim bicara telah mendapati bahawa terdapatnya kes *prima facie* terhadap perayu atas pertuduhan yang dikenakan dan telah memanggilnya untuk membela diri.

(2) Versi pembelaan yang diberi oleh perayu adalah beliau sedang menghisap 'ganja' apabila pihak polis telah memasuki rumah dan beliau telah melarikan diri dan di luar pintu belakang beliau telah tersandung dan terjatuh and terus ditangkap oleh pihak polis. Menurut perayu, pertama kali beliau telah melihat beg hijau itu adalah apabila beliau telah disoalsiasat di stesen polis oleh SP9, Pegawai Penyiasat (PP) dan di dalam bilik PP itulah beliau melihat beg hijau itu dan mendakwa beliau dipaksa membuat pengakuan bahawa beliau adalah pemilik beg hijau itu. Hakim bicara berkewajipan untuk mempertimbangkan segala keterangan yang dikemukakan di hadapannya dan untuk memutuskan sama ada pihak pendakwaan telah membuktikan kes melampaui keraguan munasabah di bawah s. 182A Kanun Tatacara Jenayah. Satu penelitian penghakimannya menunjukkan bahawa hakim bicara tidak mempertimbangkan versi perayu sama sekali. Beliau tidak menganalisis atau memberi sebab-sebab mengapa versi pembelaan tidak boleh dipercayai. Dengan

tidak bertindak sedemikian, beliau telah gagal mempertimbangkan versi perayu *vis a vis* versi pendakwaan. Terdapatnya satu salah arah asas oleh hakim bicara dalam mempertimbangkan kes pembelaan.

(3) Untuk mencapai keputusan sama ada versi pembelaan atau versi pendakwaan harus dipercayai akan melibatkan satu penilaian kredibiliti saksi-saksi dan bagaimana mereka bertahan semasa soal balas. Ia adalah salah untuk membuat penilaian sedemikian dalam mencapai dapatan versi yang mana satu yang boleh diterima kerana mahkamah ini tidak mempunyai manfaat kelebihan audio hakim bicara yang telah mendengar dan menerima keterangan.

Case(s) referred to:
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A
Dangerous Drugs Act 1952, ss. 37(d), (da)(vi), 39B(1)(a)

For the appellant - Mohd Radzi Yatiman; M/s Rahim & Lawrnee
For the prosecution - Shoba Venu Gopal DPP; AG's Chambers

Reported by Suhainah Wahiduddin

JUDGMENT

Sulong Matjeraie JCA:

[1] The appellant was convicted of an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 and he was sentenced to death by hanging.

[2] In bringing this appeal the appellant raises two main grounds as follows:

(i) Learned judge did not make any specific finding that he was in possession of the offending drugs;

(ii) That the learned judge misdirected herself in law when considering the defence in that the learned trial judge failed to consider that the prosecution version of the story and the defence version were diametrically opposed to each other.

A Despite this, the learned trial judge did not consider whether the appellant's version had cast a reasonable doubt on the prosecution's case.

We will deal with each of these issues

B **[3]** On the first issue of possession, we do not agree with the submission of the learned counsel for the appellant because in the judgment of the learned trial judge there was a finding made that the appellant had physical possession of the green bag containing the offending drug. A reading of the decision of the learned trial C judge shows that in arriving at her finding, she had referred to the evidence of several prosecution witnesses including the evidence of SP2, the Police Officer who led the raiding party. It was his evidence that on entering House No. 539 he saw a person wearing a sarong without a shirt clutching a green bag under his D right armpit. Upon the Police Party identifying themselves as Police the Malay man who was subsequently identified as the appellant took flight by running out of the back door of the house chased by SP2 and SP7. The evidence of SP2 is that the appellant was chased in the direction of a lane between houses No. 486 and E 488 where on being confronted by the second group of Police Officers who were stationed there, the appellant released the green bag which fell to the ground whereafter the appellant himself stumbled and fell whereupon he was apprehended and the green bag was recovered by SP2. F

[4] On inspection of the green bag it was found to contain dried plant materials which were confirmed by the Chemist to be cannabis weighing 776.86 gram.

G **[5]** The account of SP2 of giving chase and apprehending the appellant in the alley between houses Nos. 486 and 488 is supported by the evidence of SP7 and SP5.

[6] Based on such evidence and of the evidence of the appellant H having taken flight we find that the learned judge was entitled to come to her finding that the appellant was in physical possession of the green plastic bag containing the impugned drugs and that he knew what the bag contained. Accordingly the learned judge was entitled to find that the appellant was in *mens rea* possession I of the drugs. Therefore she was correct not to rely on s. 37(d) Dangerous Drugs Act 1952 to presume possession.

[7] Since the weight of the cannabis exceeded 200 grams the learned judge was entitled to invoke the presumption of trafficking under s. 37(da)(vi) Dangerous Drugs Act 1952 and to find that a *prima facie* case has been made out against the appellant on the offence charged and to call him to enter his defence. Accordingly on this issue we find no error on the part of the trial judge.

[8] On the second issue, on his defence being called, the appellant elected to give sworn evidence. The version of the story he gave was diametrically opposite to the prosecution's version in that it was his case that he saw the police come and parked their car in front of his house. According to the appellant he was smoking "ganja" and therefore on entry of the police to the house he immediately took flight in the direction of the kitchen and the back door. The appellant said that just outside the back door he stumbled and fell and was immediately apprehended by the police whereafter he was taken back into the house where the police conducted a search in the house.

[9] According to the appellant from a room marked 'C' in the sketch plan marked P9, the police recovered a black plastic bag. According to the appellant the first time he ever set eyes on the green bag was when he was being interrogated at the police station by SP9, the Investigating Officer (I.O.). It was in the I.O.'s room that he saw the green bag on the I.O.'s desk when he was allegedly forced to admit that the green bag belongs to him.

[10] This version of the appellant, if believed, would mean that when he took flight from the house on the day in question, he was clutching nothing but his sarong. It would also mean that the reason for his flight was that he was smoking "ganja" and not because he knew that he was in possession of the bag containing the offending drug.

[11] It is necessary to emphasise that the prosecution's version was that when the appellant took flight he was clutching the green bag under his armpit and was only apprehended between the houses No. 486 and 488.

[12] Given these two versions, the learned trial judge had a duty to consider and scrutinise the appellant's version and to say why even if she did not believe the appellant's story, it did not cast a

A reasonable doubt on the prosecution's case. In undertaking that duty, the learned trial judge was obliged to consider all the evidence adduced before her and to decide whether the prosecution has proved the case beyond reasonable doubt under s. 182A Criminal Procedure Code.

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[13] A perusal of her judgment shows that the learned judge did not consider the version of the appellant at all. All she said was that she agreed with the submission made by the prosecution that the defence version cannot be believed but she did not analyse or C give reasons why the defence version could not be believed.

[14] In not having done so, it is clear that she failed to consider the version of the appellant *vis-à-vis* the prosecution's version.

[15] As an example of the learned judge's failure to consider the D defence, we refer to the cross examination of SP2, the Raiding officer in relation to the location where the green bag was found. It was put to SP2 no less than three times in his cross examination in the following manner:

E Page 68 Jilid Pertama, lines 20-35

SP2 S: Kamu setuju jika saya katakan bahawa beg hijau tidak ditemui di dalam rumah No.539?

J: Tidak setuju.

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[16] This answer of SP2 suggests that the green bag containing the offending drugs was found in the house No. 539 which in turn contradicts the prosecution version that the appellant took flight with the green bag which was recovered in the lane between houses No. 486 and 488. SP2's answer is more consistent with G the appellant's version. SP2's answer was never considered and evaluated by the learned judge when considering the case as a whole.

[17] We accordingly find that there is a fundamental misdirection H by the learned judge in considering the defence case.

[18] It was the submission of the learned deputy that if the learned trial judge had not considered the defence of the appellant then we as the Court of Appeal should do so on the strength of I the decision of the Federal Court in *Ahmad Najib Aris v. PP*

[2009] 2 CLJ 800 in which case it was held that the Court of Appeal is empowered to review or re-evaluate all evidence in the High Court notwithstanding that the High Court Judge did not make specific findings or give reasons for its finding.

[19] We find that we are unable to accede to this request because to arrive at a decision whether the version of the prosecution or the defence was to be believed, that process would involve an evaluation of the credibility of the witnesses and how they withstood cross examination. Not having the benefit of the trial judge's audio visual advantage of hearing and receiving that evidence it will be wrong for us to make such evaluation to arrive at a finding of which version of the story is to be preferred.

[20] For all the above reasons, we therefore allow the appeal and we quash the conviction and set aside the sentence.